No. 799

In the Supreme Court of the United States

OCTOBER TERM, 1944

SAFEWAY STORES, INCORPORATED, PETITIONER

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 84–87) is reported in 145 F. (2d) 846.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered November 29, 1944 (R. 88). The petition for a writ of certiorari was filed December 29, 1943. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, as amended, c. 26, 56 Stat. 23 (herein sometimes referred to as "the Act"), making applicable

Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTIONS PRESENTED

1. Whether Maximum Price Regulation 355 issued by the Price Administrator establishing maximum prices for sales of meat at retail is arbitrary and capricious or otherwise contrary to law because it does not establish a single maximum price for sales of each grade and cut of meat by all retail sellers, as recommended by certain representatives of the industry.

2. Whether Maximum Price Regulation 355 issued by the Price Administrator establishing maximum prices for sales of meat is arbitrary, capricious or otherwise contrary to law because for the purpose of such prices it classifies retail stores in part on the basis of volume and in part on the basis of gross margins realized on meat in 1941.

3. Whether the Emergency Court of Appeals determined, contrary to Section 204 (a) of the Act, that it is not authorized to set aside a maximum price regulation which has been established to be arbitrary or capricious unless it is also shown to be unfair and inequitable to a major portion of the industry affected.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, and of

Maximum Price Regulation No. 355—Retail Ceiling Prices for Beef, Veal, Lamb and Mutton Cuts, and all Variety Meats and Edible By-Products—are set forth in the Appendix, *infra*.

STATEMENT

On and after May 18, 1942, the maximum prices for the sale at retail of beef, veal, lamb and mutton cuts were fixed by the General Maximum Price Regulation (7 F. R. 3153) at the highest price at which such cuts were sold by the same seller in the month of March 1942. On April 5, 1943, the Administrator issued Maximum Price Regulation No. 355, Retail Ceiling Prices for Beef, Veal, Lamb and Mutton Cuts,[1] which was designed to substitute dollars-and-cents retail prices, uniform within defined zones, for the ceilings established on fresh meats at retail by the General Maximum Price Regulation. Regulation No. 355 established two sets of prices for each zone. The higher set of prices applied to so-called "Group 1 and 2" stores, defined to include all retail food stores, other than chain stores, whose gross sales of all commodities in the year 1942 were less than $250,000. The lower set of prices applied to "Group 3 and 4" stores, which included all other stores; that is, any chain store—defined as one of four or more stores under common ownership whose combined sales in 1942 were $500,000 or

[1] 8 F. R. 4423. See R. 53–63 (Statement of Considerations).

more—and any independent store with gross annual sales of $250,000 or more in 1942.[2]

Originally Maximum Price Regulation No. 355 was to become effective April 15, 1943. Amendment No. 1[3] to Maximum Price Regulation No. 355 postponed the effective date of the regulation until May 17, 1943, in order to permit reexamination of the prices in the light of Executive Order No. 9328, issued April 8, 1943, which directed the Price Administrator "to authorize no further increases in ceiling prices except to the minimum extent required by law." Amendment No. 2,[4] issued May 12, 1943, reduced the prices originally announced for beef cuts. Amendment No. 3,[5] issued May 14, 1943, in effect created a new (or third) class of stores, consisting of those which had a total sales volume in 1942 of $250,000 or more, and which were members of a chain store organization having a combined total sales volume in 1942 of $40,000,000 or more. Prices for those stores were fixed 10% below the prices for other Group 3 and 4 stores. After further consideration and consultation with the trade, the Administrator, by Amendment No. 10,[6] issued September

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[2] By Amendment No. 16 to the regulation, issued May 24, 1944, the year 1943 was substituted for 1942, 9 F. R. 5504, 5505.

[3] 8 F. R. 4922.

[4] 8 F. R. 6214.

[5] 8 F. R. 6428. See R. 64 (Statement of Considerations).

[6] 8 F. R. 12237. See R. 65–66 (Statement of Considerations).

2, 1943, changed the third classification to include any individual chain or independent Group 3 or 4 store which in 1941 had a total gross margin of 19% or less on its meat department sales. Prices for the third class, as thus redefined, were fixed 4% below the Group 3 and 4 prices.

Petitioner is the owner and operator of some 2,300 retail food stores located in many states. Since the combined sales volume of all its stores was more than $40,000,000 in 1942, it was required, by Amendment No. 3, to take the 10% lower price for meat in those of its stores which had a 1942 sales volume of $250,000 or more. (R. 1–2.) The protest followed. Amendment No. 10 raised the lower price from 10% below the Group 3 and 4 level to 4% below. And it made the price applicable to stores on the basis of their 1941 gross meat margin, rather than their volume of sales. In response to the Administrator's order providing an opportunity to show why the relief requested had not been granted (R. 26), petitioner submitted a statement which was directed primarily at the reiteration of objections to any price classification at all (R. 29–38). The protest was then denied with an opinion (R. 40–52), and petitioner filed its complaint with the Emergency Court of Appeals (R. 70–78). The court sustained the denial of the protest and dismissed the complaint. (R. 84–88.)

ARGUMENT

The petition does not present any generally significant question warranting consideration by this Court, and the decision of the court below was clearly right.

I. Underlying petitioner's diverse assertions of errors by the Administrator and by the court below is the single objection that it is arbitrary and capricious to classify retail stores so as to establish different maximum prices for sales at retail of the same cut and grade of meat in the same geographical zone. The reasons for having any classification at all of retail stores for the purpose of establishing maximum retail meat prices were set forth in the Administrator's opinion denying the protest. (R. 46–47.) Some classification was deemed necessary for the reason that, prior to price control, there was a wide range in the margins of different types of retail stores. Petitioner at no time disputed that this condition prevailed generally in the industry. It is, indeed, a matter of common knowledge.[7] The failure to recognize this fact would clearly have been inconsistent with fair and workable price control. A single maximum price would have been either too low to permit the continued opera-

[7] In fact, petitioner's protest stated that the Great Atlantic and Pacific Tea Co. and Colonial Stores, Inc. ordinarily have three ranges of prices in their retail food stores (R. 10, 13). Cf. *Great Atlantic and Pacific Tea Co.* v. *Ervin*, 23 F. Supp. 70, 77 (D. Minn. 1938).

tion of the small service stores or so high that the larger stores offering less service would have had unprecedented margins and consumers would have had unnecessary price increases. With respect to petitioner's insistence that competition would have held prices down, it is enough to say that the Administrator cannot be deemed to have been unreasonable, considering the inflationary forces at large (cf. *Philadelphia Coke Co.* v. *Bowles,* 139 F. (2d) 349 (Em. App. 1943)), in refusing to rely upon competitive forces to keep prices at proper levels.

Petitioner's attack upon the lawfulness of any classification of retail stores is based in part on the contention that the Administrator refused to follow the recommendation of members of the industry. While changes in Amendment No. 3 to Maximum Price Regulation No. 355 were under consideration, the Office of Price Administration conducted a meeting attended by certain representatives of the industry. They recommended that a single maximum price should be established at retail for each cut and grade of meat. Petitioner argues that the issuance of Amendment No. 10 in the face of this recommendation was arbitrary and capricious because it violated the provision in Section 2 (a) of the Act which requires that "Before issuing any regulation or order * * * the Administrator shall, so far as practicable, advise and consult with representa-

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tive members of the industry which will be affected by such regulation or order."

Petitioner reads a requirement of consultation as imposing an absolute duty to follow the recommendations of those consulted. This is obviously untenable. It is true, of course, that an obligation to consult implies an obligation to consider the recommendations of those consulted.[8] But there is no doubt that the Administrator considered the recommendation that price differentials be abolished. The opinion denying the protest sets forth the reasons why the Administrator deemed it improper to disregard, in the establishment of maximum prices, the variations in selling price among classes of stores which existed before price control (R. 46).[9] That consideration marks the limit of the Administrator's statutory obligation. Moreover, it can hardly be deemed arbitrary to reject recommendations which would place upon normal competitive forces a large part

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[8] This obligation has been made explicit by the Stabilization Extension Act of 1944, which adds to the provision quoted above the clause: "and shall give consideration to their recommendations."

[9] It may be noted that the food industry was not unanimously opposed to the principle of classifying retail prices. At the hearings before the House Committee on Banking and Currency, in connection with the extension of the Emergency Price Control Act, counsel for the Food Industry War Committee opposed recommendations for a one-price policy in retail stores for substantially the same reasons which led the Administrator to reject them. Hearings on H. R. 4376, 78th Cong., 2d Sess., Vol. 1, p. 408.

of the burden of keeping in control the wartime prices of important cost-of-living commodities.

2. Petitioner's more specific objection to Maximum Price Regulation 355 is directed against the 4% differential in price established for Group 3 and 4 stores which in 1941 had a meat department sales margin of 19% or less. The evolution and basis of this particular classification and differential are set forth in full in the Administrator's opinion accompanying the denial of the protest and are well summarized in the opinion of the court below (R. 47–51, 86–7). As those opinions indicate, the Administrator initially set up for meat prices the same classifications, based on chain affiliation and aggregate store sales volume, which had been used in earlier food regulations, with one difference: only two sets of prices were fixed, one for Group 1 and Group 2 stores, the other for Group 3 and Group 4 stores. Comparison of the proposed prices with those prevailing under the General Maximum Price Regulation—which reflected actual selling prices in March 1942—revealed that extreme price increases would result among the Group 3 and 4 stores. To preserve the pre-existing pattern, and to avoid unwarranted price increases, a third class was required. The distinction between Group 3 and Group 4 stores on the basis of sales volume alone, which had generally provided a satisfactory boundary, did not reflect, however, the pre-existing price differences in meat and so would not have furnished a suitable classification.

It appeared, in general, that the lower meat prices had prevailed in the larger chains. Accordingly, Amendment No. 3, which was issued before the regulation became effective,[10] established for the large volume stores of the large chains prices 10% below those established for other Group 3 and 4 stores. After the regulation became effective, the Administrator found that the basis for defining the third class of stores had two undesirable consequences. It resulted in an undue burden on some individual outlets, and it left at the higher prices some independent supermarkets, and some stores in small chains, which had customarily had margins and prices as low as those of low margin stores in the larger chain organization.

An effort was made to formulate a classification which would preserve about the same price level, but which would avoid these undesirable effects. Further study indicated that there had been in the past about a two-cent price difference between the higher priced stores and the lower priced stores within Group 3 and 4. Because of

[10] Amendment No. 3 was issued May 14, 1943 and the Regulation became effective May 17. Under these circumstances, it is not clear what justification there is for petitioner's repeated reference to the action as a price "rollback." There is nothing in the record to show that petitioner fared differently than the other chain stores for which the prices established when Maximum Price Regulation No. 355 became effective represented an increase over the prices theretofore prevailing under the General Maximum Price Regulation (R. 48).

changes in buying opportunities, and other conditions brought about by the war, the Administrator concluded that under the regulation the price difference should not exceed one cent. Since volume of sales alone did not, in this particular case, define the low-priced from the high-priced sellers, the Administrator concluded that a fairer basis for distinction would be the actual, historical operating margins of the sellers. A 19% margin was picked as the dividing line because study of the historical margin data available indicated that a 19% margin reflected a price level one cent, or 4%, below the general Group 3 and 4 level. In other words, a store which in March 1942 had a price one cent below the prices which existed in the small chain stores at that time would have had an all-meat margin of 19%. The Administrator therefore provided, by Amendment 10, that the maximum prices for any store, chain or independent, which had annual sales of more than $250,000 in 1942 and a total gross margin of 19 percent or less in its meat department in 1941 should be 4% below the dollars and cents prices previously specified for Group 3 and 4 stores.[11]

Petitioner argues that the Administrator acted arbitrarily because the classification is based in part on sales volume and in part on historical

[11] By Amendment No. 12, 8 F. R. 14738, these prices were set up in the regulation in dollars and cents form, referred to as Group 3B and 4B.

margins. But petitioner at no point in the proceeding attacked the Administrator's finding that the modification in the basis for classification was designed to and did achieve differentials in maximum prices more closely approximating the price differentials which prevailed among different classes of stores before price control. Such an adjustment would appear to be the antithesis of arbitrary action, as the court below observed. Moreover, in the absence of any showing that the classification adopted failed to reflect with reasonable precision the pre-existing competitive price relationships, it is difficult to determine the ground for petitioner's charge that the classification established by Amendment No. 10 was without substantial basis.

Petitioner apparently contends (Pet. 20–21) that the Administrator's action must be deemed arbitrary unless the record contains all the statistical data underlying the determination that a classification based upon a 19% margin and a differential of 4% would fairly reflect the historical price differentials prevailing before price control, even in the absence of a challenge specifically directed to the correctness of that determination. In advancing this suggestion petitioner confuses a statement of the Emergency Court of Appeals in *Montgomery Ward & Co.* v. *Bowles,* 138 F. (2d) 669, 672, applicable solely to statements of considerations accompanying the issu-

ance of maximum price regulations, with language of this Court in *Yakus* v. *United States*, 321 U. S. 414, relevant to the evidence which the record must contain in order to support findings of the Administrator which have been appropriately challenged. Neither the provisions of the statute nor the opinion of this Court in the *Yakus* case require that the Administrator must include in his statements of considerations or his opinions accompanying the denial of protests all of the economic material or statistical data having any bearing upon the price action involved, irrespective of the nature of the challenge to that action. Such a requirement would indeed render administration impossible.

Petitioner also relies on three admittedly hypothetical cases to establish the arbitrary character of the classification. The short answer is that difficult border line cases are inescapable when the problem requires the drawing of precise lines where there existed before a continuously varying range of differences. Cf. *Carmichael* v. *Southern Coal and Coke Co.*, 301 U. S. 495, 510.

3. Finally, petitioner asserts that in deciding the present case the Emergency Court of Appeals so interpreted the Act as to render it unconstitutionally discriminatory and make the review provisions ineffectual in violation of the due process clause of the Fifth Amendment. This argument is based primarily on the assumption

that the Administrator's action was in fact arbitrary, an assumption which is without substance for the reasons already indicated. The argument further assumes that the Emergency Court of Appeals has construed the Act as requiring that a regulation or order be set aside only if it is unfair and inequitable to a major portion of the industry affected. Prior decisions of the court below, as well as the decision in the present case, show that this charge is unfounded.

Section 2 (a) of the Act requires that regulations issued by the Price Administrator shall be generally fair and equitable. The Emergency Court of Appeals has construed this requirement, consistently with its plain meaning and the clear evidence of congressional intention as found in the legislative history,[12] as meaning that a maximum price regulation "must be fair and equitable in its application to the group of sellers considered as a whole"; that it does not meet this standard "if its application to a major portion

[12] For example, the report of the Senate Committee on the bill which became the Emergency Price Control Act said, with respect to Section 2 (a):

"Because of the legislative nature of regulations establishing maximum prices, applying to large numbers of sellers, the bill does not guarantee a profit to each individual seller. It requires instead that such prices be generally fair and equitable as applied to the sellers responsible for the major part of the output of the commodity. As to such sellers it is the effect of the maximum price upon their over-all operations as business units that must be considered." (Sen. Rep. 931, 77th Cong., 2d Sess., p. 15.)

of the industry is unfair or inequitable." *Philadelphia Coke Co.* v. *Bowles*, 139 F. (2d) 349, 355. The court was there concerned with the broad problem necessarily posed by the basic standard of Section 2 (a) of the Act. Similar holdings of the court are to be found in *Madison Park Corp.* v. *Bowles*, 140 F. (2d) 316, and *Gillespie-Rogers-Pyatt Co.* v. *Bowles*, 144 F. (2d) 361. In the case last cited, the court recognized that an individual protestant might establish a *prima facie* case of general unfairness without producing evidence as to the condition of the entire industry. See also *Cudahy Bros. Co.* v. *Bowles*, 142 F. (2d) 468.

But there is nothing in any of these cases to support petitioner's assertion that the Emergency Court of Appeals has made this standard the exclusive test of the validity of the Adminstrator's action. In addition to recognizing that regulations must be generally fair and equitable, the court has repeatedly emphasized its authority to set aside regulations found to be arbitrary or capricious in their treatment of particular situations, notwithstanding their general fairness. See *Cudahy Bros. Co.* v. *Bowles*, *supra*; *Buckley, Dement & Co.* v. *Bowles*, 143 F. (2d) 877; *Flett* v. *Bowles*, 142 F. (2d) 559; *Consolidated Water Power & Paper Co.* v. *Bowles* (E. C. A.), decided December 6, 1944; *Adams, Rowe & Norman* v. *Bowles*, 144 F. (2d) 357. In the last three cases

cited, the Emergency Court of Appeals set aside the regulation involved on the ground that the complainants had established "to the satisfaction of the court that the regulation * * * [was] arbitrary or capricious."

Furthermore, in the present case the court expressly held, after reviewing the basis for the Administrator's action in adopting the classification in question, that his action "was quite the opposite of arbitrary or capricious." (R. 87.) The court's statement of its reasons for arriving at that conclusion is, we submit, unassailable.

CONCLUSION

The decision below is correct and does not warrant further review. The petition should therefore be denied.

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FEBRUARY 1945.